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No. 80-2202

IN THE

Supreme Court of the United States

October Term, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Does the New Jersey Casino Control Act as interpreted by the Supreme Court of New Jersey conflict with the Sherman Act right of a private entrepreneur to prevail over competition by superiority of product, service and reliability?

2. Does the state action exemption apply when the state statute, far from mandating the anticompetitive regulation here in question, expressly mandates promotion of competition and merely authorizes in general terms regulations regarding competition and concentration?

3. What type of consideration is required when a state court passes on a claim of exemption from the Sherman Act based on state action?

*Appellant has listed its subsidiary corporations in its Jurisdictional Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States. The list requires no amendment.

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ARGUMENT

Appellee's Motion to Dismiss contains a number of generalizations about state action and due process, but fails to address those issues which make the substantive federal questions presented unique and important. Among the central issues avoided by the Motion to Dismiss, and requiring consideration by this Court, are the following:

I. DOES THE NEW JERSEY CASINO CONTROL ACT AS INTERPRETED BY THE SUPREME COURT OF NEW JERSEY CONFLICT WITH THE SHERMAN ACT RIGHT OF A PRIVATE ENTREPRENEUR TO PREVAIL OVER COMPETITION BY SUPERIORITY OF PRODUCT, SERVICE AND RELIABILITY?

Appellee argues that the New Jersey statute directs divestiture of major market shares "no matter how obtained." (See Appellee's Motion, pp. 9 and 16). The proposition is absurd and flies in the face of federal antitrust laws, as can be seen clearly from two hypotheticals which are by no means remote from the present case:

> (i) In a market fully served by two interstate suppliers, one of them goes bankrupt in the course of fair competition with the other, leaving the latter as a sole supplier; and
>
> (ii) A manufacturer invents, perhaps even patents, a new and attractive gaming machine and becomes, of necessity, the sole initial supplier.

Consistent with the antitrust laws, this Court should not allow a state to dismember such a sole, or dominant, supplier.[1]

[1] As evidence of the continuing firm federal policy against penalizing fair competitive success, see the Address by Attorney General William French Smith to the District of Columbia Bar (June 24, 1981):

> . . . In a race, the fastest runner is not penalized by being required to wear fetters around his or her ankles. Similarly, in an economy based upon unfettered competition as the rule of trade, efficient firms should not be hobbled under the guise of antitrust enforcement. The preservation by government of inefficient competitors inevitably leads to economic distortions that will disadvantage the consumer. Address by Attorney General William French Smith to the District of Columbia Bar (June 24, 1981), *reprinted in* [1981] 5 *TRADE REG. REP.* (CCH) ¶ 50,430.

The breadth of state authority for which Appellee argues is of awesome scope. It not only implies power to restrict sales, as was done in the present case, but also permits utilization of other "structural" techniques, presumably including the splitting up of an out-of-state supplier as Appellant by compulsory spinoff of operations and assets. Pursuant to the unbounded rule advanced by Appellee, the state could pursue its "anticoncentration" purposes even by compelling the most efficient and successful supplier, to *raise* its prices so as to create greater sales opportunities for its less efficient competitors. (See Appellee's Motion, pp. 18-19) In hypothetical (ii) above, the New Jersey contention that "*any* restraint on competition," whether or not resulting from predatory conduct, can be outlawed by state administrative action (Appellee's Motion, pp. 11 and 13) would encompass a direct contradiction of even the Federal Patent Act.

Such potentials are of grave concern not only to Appellant but to the suppliers of other gambling equipment who are often sole suppliers because of the limited nature of the market. This Court is asked to sustain a radical and unnecessary extention of state power over interstate commerce if any reasonable set of facts "can be conceived to support it." (Appellee's Motion, p. 10)

II. DOES THE STATE ACTION EXEMPTION APPLY WHEN THE STATE STATUTE, FAR FROM MANDATING THE ANTICOMPETITIVE REGULATION HERE IN QUESTION, EXPRESSLY MANDATES PROMOTION OF COMPETITION AND MERELY AUTHORIZES IN GENERAL TERMS REGULATIONS REGARDING COMPETITION AND CONCENTRATION?

The opinion below explicitly states that "the regulation in question is 'within the framework of the *broad*

powers conferred on the Commission' (Jurisdictional Statement, p. A-7(a)) and is 'authorized and permitted by the Casino Control Act.'" (Jurisdictional Statement, p. A-12(a)) The specific anticompetitive regulation here in question is thus entirely a creature of the Casino Control Commission's discretion. It is absurd to suppose that the Casino Control Commission would have violated the enabling act if it had *not* adopted the 50% regulation or merely had adopted safeguards against such abuses as it perceived.

Appellee misconstrues (Appellee's Motion, p. 14) the thrust of Appellant's argument. Appellant is not asking this Court to rule on an issue of state law. Appellant maintains only that the New Jersey statute as construed by the New Jersey Supreme Court does not "clearly articulate" nor "affirmatively express" a sovereign determination to repress and displace competition.[2]

> Appellee, on the other hand, argues that:
> . . . *any restraint on competition under the regulation* is immune from attack under the antitrust laws. (Emphasis added) (Motion, Point I)

Appellee fails to recognize that the *clearly articulated state policy,* requires not a "restraint on competition" but, in fact, the promulgation of regulations which "*encourage and preserve* competition." (Emphasis added) Therefore, the adoption and enforcement by Appellee of a regulation that imposes a "restraint on competition", as Appellee admits in its Motion that the subject regulation does, is contrary to the state's articulated policy, surely *not* man-

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[2] In addition to the cases cited in Jurisdictional Statement, p. 9, see *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Affiliated Capital Corp v. City of Houston*, No. H-79-1391 (S.D. Tex., July 7, 1981). (Home rule for a city does not make it the voice of sovereign state policy to displace competition.)

dated by it, and therefore not "immune from attack under the antitrust laws."

As a consequence, a substantial and critical federal question, whether the anticompetitive action of the State of New Jersey in violation of the Sherman Act is immunized under the standards enunciated and enforced by this Court, is clearly and squarely before the Court in this case.

III. WHAT TYPE OF CONSIDERATION IS REQUIRED WHEN A STATE COURT PASSES ON A CLAIM OF EXEMPTION FROM THE SHERMAN ACT BASED ON STATE ACTION?

Is it sufficient in dealing with such an issue of federalism simply to identify a state regulatory interest or must there not also be a reasoned effort to reconcile the divergent federal and state concerns? It is absolutely critical here to distinguish between the "core" state police power over local gambling in Atlantic City's casinos and the state's ancillary concern with out-of-state suppliers. With respect to the latter, the state's power to license and closely supervise is acknowledged; but state power to displace the national law of competition cannot be assumed merely "if any reasonable set of facts can be conceived to support it." (Appellee's Motion, p. 10) Such displacement must be conditioned, at the very least, upon a reasoned analysis of the nature and source of the market structure, upon a consideration of alternate means of achieving legitimate state objectives while minimizing conflict with federal law, and upon experience with similar market structures in comparable jurisdictions, e.g., the State of Nevada. Surely the discretionary action of a state administrative agency should not be given greater presumptive effect than federal courts would give to federal administrative action.

Sentence first and trial afterwards has not been regarded as due process of law, at least since Lewis Carroll wrote "Alice's Adventures in Wonderland."[3] Without reiterating the circumstances of the Appellee's "hearing" of June 20, 1979, set forth in Jurisdictional Statement at 14-16, it may be illuminating to consider here two proposals earlier advanced by Appellant and totally ignored by the Appellee:

(i) A proposal to free smaller casinos from the imposed burden of splitting their sources of supply with resultant complication of their maintenance, inventory and repair problems; and

(ii) A proposal to exclude from the 50% quota rule the sale of used machines so that original manufacturers were not additionally penalized by second-hand sales of their machines by subsequent dealers and competitors.

So rigidly was Appellee's solution cast in stone prior to the "hearing" that these ideas were rejected without consideration, even though they were consistent with the theoretical intent of a 50% quota and would have facilitated its operation, ill-conceived though it was.

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[3] L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 118 (New York Chanticleer Press, 1948) (1st ed. London 1865).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that Appellee's Motion to Dismiss be denied.

Respectfully Submitted,

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